In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 129

CHARLES R. ALLEN, INC., GREEN BROTHERS, INC., T. W. HOLT & CO. AND RICO PRODUCTS CO., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Customs Court (R. 238-248) is reported in 22 Cust. Ct. 63. The opinion of the United States Court of Customs and Patent Appeals (R. 251-270) is reported as C. A. D. 428 in 85 Treas. Dec. 42 (Weekly Pamphlet No. 15, April 13, 1950).

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on February 2, 1950 (R. 270). A petition for rehearing was denied on March 31, 1950 (R. 271). The petition for a writ of certiorari was filed on June 14, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1256.

QUESTION PRESENTED

Whether the Court of Customs and Patent Appeals erred in holding that imported shredded coconut meat preserved in syrup was not properly classifiable for duty purposes as "coconut meat, shredded and desiccated, or similarly prepared" under the provisions of Section 1, Paragraph 758, of the Tariff Act of 1930, *infra,* p. 12, as temporarily modified by the Act of December 20, 1944, *infra,* pp. 12-13.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in the Appendix, *infra,* pp. 12-14.

STATEMENT

Section 1, Paragraph 758, of the Tariff Act of 1930, *infra,* p. 12, provides, *inter alia,* that there shall be levied and collected on imported "coconut meat, shredded and desiccated, or similarly prepared" a duty of 3½ cents per pound. By the Act of December 20, 1944, *infra,* pp. 12-13, it was provided that no duty should be levied, collected, or payable under Paragraph 758 of the said Tariff Act

with respect to coconut meat during the period beginning with the day following the passage of the Act of December 20, 1944, and ending with the termination of the unlimited national emergency proclaimed by the President on May 27, 1941. At various times between April 18, 1945, and March 12, 1947, petitioners imported from Cuba, at the port of Tampa, Florida, certain grated coconut meat which had been preserved in sugar syrup and packed in hermetically sealed cans (R. 2-3, 5-11, 241, 255). It was admitted that the coconut meat here involved was imported during the period of the national emergency proclaimed by the President on May 27, 1941 (R. 255).

The Collector of Customs at the port of Tampa, Florida, classified the coconut meat as "edible nuts, * * * pickled, or otherwise prepared" and assessed duty thereon at the rate of 35 per centum ad valorem under the provisions of Paragraph 761 of the Tariff Act of 1930, *infra,* p. 12, less the Cuban Treaty preferential of 20 per centum (R. 238). Petitioners filed protests to the collector's decisions, contending that the merchandise should have been classified as "coconut meat, shredded and desiccated, or similarly prepared" under the provisions of Paragraph 758 of the Tariff Act, *infra,* p. 12, and permitted to enter the United States free of duty, as provided by the Act of December 20, 1944, *infra,* pp. 12-13 (R. 2-3, 5, 7-8). The collector of customs thereupon reviewed the protested decisions and

affirmed his prior actions (R. 8-9). Accordingly, he transmitted the relevant papers to the Customs Court for its decision, as required by law (R. 9). Thereafter, the protests were amended to claim that if the merchandise was not classifiable directly as "coconut meat, shredded and desiccated, or similarly prepared" under Paragraph 758, it was classifiable under that paragraph as a similar article by virtue of the similitude provisions of Paragraph 1559[1] of the said Tariff Act, *infra,* p. 12 (R. 10-11).

The Customs Court sustained the protests, holding that the merchandise was classifiable directly under Paragraph 758, and was, therefore, free of duty under the Act of December 20, 1944, *infra,* pp. 12-13 (R. 238-249). In so holding the Customs Court reached the conclusion that the coconut meat here involved, despite the fact that at the time of its importation it was preserved in liquid sugar or syrup, was coconut meat prepared similarly to the shredded and desiccated coconut meat provided for in Paragraph 758 (R. 247).

On appeal, the court below reversed the decision of the Customs Court (R. 251-270). The court be-

[1] The amendments to the protests further claimed the merchandise to be classifiable as either "unenumerated unmanufactured" or "unenumerated manufactured" articles under Paragraph 1558 of the Tariff Act of 1930 (19 U.S.C. 1001, Par. 1558). They also claimed it to be classifiable as "sugar candy and all confectionary not specially provided for" under Paragraph 506 of the said Tariff Act (19 U. S. C. 1001, Par. 506). (R. 10, 239.) The claims made under Paragraphs 1558 and 506 were later abandoned by petitioners (R. 240).

low, after reviewing the tariff provisions covering desiccated coconut meat appearing in the various tariff statutes over a period of many years, the legislative history thereof, and the court decisions thereunder, reached the conclusion "that Congress used the term 'desiccated' as synonymous with 'dried' or 'evaporated' and as a distinct classification from 'preserved', or packed in sugar" (R. 263). Accordingly, it held that the coconut meat at bar was not prepared similarly to the desiccated shredded coconut meat provided for by Paragraph 758. It also held that it was not classifiable under Paragraph 758 by virtue of the similitude provisions of Paragraph 1559, *infra,* p. 12. Consequently, it concluded that the imported coconut meat could not be duty free under the Act of December 20, 1944, *infra,* pp. 12-13. (R. 264-268) On the basis of its conclusion that the imported merchandise did not fall within any of the claims set forth in petitioners' protests and in the absence of a showing by petitioners that the collector's action in classifying the coconut meat as edible nuts under Paragraph 761, *infra,* p. 12, was clearly erroneous, it reversed the decision of the Customs Court without specifically approving the collector's classification of the merchandise (R. 268-270).

ARGUMENT

The decision of the court below, which is not in conflict with any of its own prior decisions or with any decision of this Court, involves, in substance,

nothing more than the construction of Paragraph 758, *infra*, p. 12, one of the nearly two thousand duty classifications provisions appearing in the merchandise schedules of the Tariff Act of 1930.[2] The case is not one which warrants review by this Court.

1. We submit that the court below was correct in holding that the imported coconut meat, which was preserved in syrup, was not properly classifiable under Paragraph 758 which covers only "coconut meat, shredded and desiccated, or similarly prepared." It is persuasive that coconut meat preserved by immersing it in liquid is not prepared "similarly" to coconut meat preserved by the wholly different process of desiccation. As the court below stated (R. 264):

> Desiccated coconut meat is prepared by removing the moisture. It is dried or dehydrated. The merchandise at bar was prepared by adding moisture. It is coconut meat preserved in syrup. There is no similarity between the manner in which desiccated coconut meat is prepared and the manner in which the imported product is prepared. The methods are very *dissimilar*—they are *opposites*. [Italics ours.]

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[2] The Act of December 20, 1944, *infra*, pp. 12-13, which permitted duty-free entry during the national emergency to coconuts and coconut meat unquestionably limited the free entry to the articles covered by Paragraph 758. That Act expired as of September 7, 1947. See Section 4, Act of August 8, 1947, 61 Stat. 917.

Petitioners contend that Paragraph 758 does not require the coconut meat provided for therein to be both shredded and desiccated. They assert that if the word "and" appearing between the word "shredded" and the word "desiccated" is read as "or" their merchandise falls within the language of the paragraph, and they argue that the court below was remiss in not discussing the rule of construction which permits the interchanging of those words, where to do so will carry out the intention of the legislature. The court below, however, ascertained from the legislative history of Paragraph 758 that it was the intention of the Congress that coconut meat should be dutiable under that paragraph only in the event that it should be both shredded and desiccated. Consequently, there was no occasion for the court to discuss that rule, and, in the circumstances, it would, of course have been improper for the court to apply it. The extensive legislative history upon which the court below relied to show that the Congress did not use the conjunctive "and" inadvertently is set forth in its opinion (R. 256-263). That history, we submit, adequately supports the court's holding that the language "shredded and desiccated" appearing in Paragraph 758 excludes from that paragraph coconut meat that is not both shredded and desiccated.

Petitioners assert that the statement of the court below to the effect that the trade understanding of the scope of Paragraph 758 was that the paragraph

was limited to coconut meat which was both shredded and desiccated, was tantamount to a finding of commercial meaning without evidence to support it (Pet. 30-33). This assertion is inaccurate, for it is obvious that the court was construing Paragraph 758 and not making a "finding" that coconut meat had a commercial meaning different from its common meaning; it was merely relying upon such materials as legislative hearings (R. 260-261, 269) in construing a statute.

The court below was likewise plainly correct in holding that the imported merchandise was not classifiable under Paragraph 758 by virtue of the similitude provision in Paragraph 1559, *infra,* p. 12. A contrary holding would make Paragraph 758 work an absurdity, for it would be saying, in effect, that an article which is excluded from coverage under the language of the paragraph itself, is still included therein by virtue of the general language in another paragraph of the Act. Cf. *Schoenemann* v. *United States,* 119 Fed. 584, 586 (C.A. 3d); *Fensterer* v. *United States* 1 Ct. Cust. Appls. 93, 98. Moreover, a contrary holding would require a construction of Paragraph 758 which would render nugatory the words "or similarly prepared" appearing therein, for it is obvious that if shredded coconut meat falls within the paragraph by similitude regardless of the manner in which it is prepared, the quoted words were unnecessary and their inclusion in the statute represented a futile act on the part of the Congress. In this con-

nection, it will be observed that the similitude provided for by Paragraph 1559, *infra,* p. 12, relates broadly to the similarity of the "material, quality, texture, or the use to which it [the article] may be applied," while the similarity required by Paragraph 758 is limited solely to the *method of preparing* coconut meat. Consequently, to bring the coconut meat here involved under Paragraph 758 by the application of any of the forms of similitude permitted by Paragraph 1559, without regard to the similarity of preparation required by Paragraph 758 itself, would be inconsistent with the latter and would leave the words "or similarly prepared" appearing therein without force and effect, for if coconut meat is to be classified under Paragraph 758 solely on the basis of similarity of material, quality, texture, or use (only one of which need be shown—*United States* v. *Eckstein,* 222 U. S. 130, 136-138), it is difficult to conceive of any form of "coconut meat" which would not fall within the purview of that paragraph.

The case of *United States* v. *Conkey,* 12 Ct. Cust. Appls. 552, relied upon by petitioners (Pet. 25) to support their contention that the rule of similitude should be applied to their coconut meat, is inapposite. In that case, the court below held that "frozen lamb" was classifiable by similitude as "fresh lamb." However, the tariff provision there considered, which enumerated "fresh lamb," contained no specific similitude provision

of its own, and there was no occasion in that case for the court to consider the general similitude provision of the tariff act in light of a specific similitude provision such as the language "or similarly prepared" which appears in Paragraph 758. For the same reason, the decisions of this Court cited generally by petitioners on the similitude point (Pet. 22-25) are not controlling.

2. Petitioners contend generally that the Reciprocal Trade Agreement entered into between the United States and the Republic of Cuba, 49 Stat. (Pt. 2) 3559, as amended, 54 Stat. (Pt. 2) 1997, 55 Stat. (Pt. 2) 1449, shows an intention on the part of the United States to construe liberally any tariff provision affecting imports from Cuba (Pet. 21-22), and they cite *Factor* v. *Laubenheimer*, 290 U. S. 276, in support of their contention. We find nothing in the *Laubenheimer* case that has any relevance to petitioners' contention, and, apart from the 20% preferential in duty granted to Cuban products, there is nothing in the Cuban Trade Agreement *infra*, pp. 13-14, or in any statute, to the effect that the classification provisions of United States tariff laws may be interpreted or construed more liberally with respect to Cuban products than they are with respect to products coming from other countries. We submit that the contention is without substance.

CONCLUSION

The decision of the court below is clearly correct and there is no conflict of decision. Accordingly, no further review of the case is warranted. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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JULY, 1950.

APPENDIX

Tariff Act of 1930, 46 Stat. 590 (19 U.S.C. 1001):

Section 1. That on and after the day following the passage of this Act, * * * there shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States * * * the rates of duty which are prescribed by the schedules and paragraphs of the dutiable list of this title, namely:

Par. 758. Coconuts, one-half of 1 cent each; coconut meat, shredded and desiccated, or similarly prepared, 3½ cents per pound.

Par. 761. Edible nuts, not specially provided for, * * * pickled, or otherwise prepared or preserved, and not specially provided for, 35 per centum ad valorem; * * *

Par. 1559. That each and every imported article, not enumerated in this Act, which is similar, either in material, quality, texture, or the use to which it may be applied to any article enumerated in this Act as chargeable with duty, shall be subject to the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; * * *

Act of December 20, 1944, 58 Stat. 817:

* * * That no duty shall be levied, collected, or payable under the Tariff Act of 1930, as amended, with respect to coconuts or coconut meat provided for in paragraph 758 of that Act, entered, or withdrawn from warehouse, for consumption, during

the period beginning with the day following the date of enactment of this Act and ending with the termination of the unlimited national emergency proclaimed by the President on May 27, 1941.

Reciprocal Trade Agreement entered into between the United States and the Republic of Cuba, 49 Stat. (Pt. 2) 3559, 54 Stat. (Pt. 2) 1997, 55 Stat. (Pt. 2) 1449:

The President of the United States of America and the President of the Republic of Cuba, desirous of strengthening the traditional bonds of friendship and commerce between their respective countries by maintaining as the basis for their commercial relations the granting of reciprocal preferential treatment, * * *

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ARTICLE III

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Every article the growth, produce, or manufacture of the Republic of Cuba which is not provided for in Article I, and which is not enumerated and described in Schedule II annexed to this Agreement, shall, on importation into the United States of America, be granted an exclusive and preferential reduction in duty of not less than 20 per centum, such percentage of reduction being applied to the lowest rate of duty now or hereafter payable on the like article the growth, produce, or manufacture of any other foreign country.

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ARTICLE XIV

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Laws, regulations of administrative authorities, and decisions of administrative or judicial authorities, pertaining to the classification of articles for customs purposes and to rates of duty shall be published promptly in such a manner as to enable traders to become acquainted with them. * * *

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